STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2011
v	No. 297174 Oakland Circuit Court
DAVID WAYNE WITKOWSKI, Defendant-Appellant.	LC No. 2009-226963-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant was tried in a single trial with his father, David Cluesman (David C.), before two separate juries. Defendant appeals by right his jury trial convictions of conspiring to deliver or possess with intent to deliver 450 to 999 grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(ii),[1] and delivery of 450 to 999 grams of cocaine, MCL 333.7401(2)(a)(ii). Defendant was sentenced to 13 to 30 years' imprisonment for each count. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his conviction of delivering over 450 grams of cocaine. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Further, we are to draw all reasonable inferences and resolve all evidentiary conflicts in favor of the jury's verdict. *Id*. at 400. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Id.*

[1] Defendant was charged with conspiracy to deliver or possess with intent to deliver 1,000 grams or more of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(i), but was convicted of the lesser-included offense.

The elements of delivery of at least 450 grams but less than 1,000 grams of cocaine are (1) delivery of a controlled substance; (2) the controlled substance was cocaine; (3) the cocaine was in a mixture that weighed between 450 and 1,000 grams; and (4) defendant knew he was delivering cocaine. MCL 333.7401(1), (2)(a)(ii); see also *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001). "Delivery" means "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

But, one need not be the actual person who performed the "delivery" to be guilty of this crime. One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a verdict that a defendant aided and abetted a crime, the prosecutor must prove:

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).]

The state of mind of an aider and abettor may be inferred from all the facts and circumstances. *Carines*, 460 Mich at 757. Some of the factors that may be considered include a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *Id.* at 758.

It is not disputed that defendant's brother, Daniel Cluesman (Daniel), acted as the principal and actually delivered a 977.3-gram cocaine mixture to undercover Detective Cory Bauman on April 30, 2009. The jury heard two conflicting accounts regarding defendant's participation. Rocky Johnson testified that defendant knowingly agreed to participate as a lookout for the cocaine transaction at the Meijer store. Defendant and Daniel, on the other hand, contended that while defendant did go to aid Daniel, he was going for the purpose of "backing him up" for a fight with a "biker dude" and had no knowledge of any drugs. The verdict clearly shows that the jury found Rocky more credible than defendant and Daniel. "[T]he resolution of credibility questions is within the exclusive province of the jury." *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009). Because Rocky's testimony was sufficient to permit a jury to find beyond a reasonable doubt that defendant aided and abetted the delivery of 977.3 grams of the cocaine mixture by, at a minimum, willingly and knowingly acting as a lookout, we must affirm defendant's conviction. *Nowack*, 462 Mich at 399-400.

Defendant next argues that there was insufficient evidence to support his conspiracy conviction. We disagree.

A conspiracy is an express or implied mutual agreement or understanding "between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means." *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991); MCL 750.157a. "Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal

objective." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Direct proof of a conspiracy is not essential; rather, the coconspirators' intentions may be inferred from the circumstances and their acts and conduct. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). "What the conspirators actually did in furtherance of the conspiracy is evidence of what they agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002).

To support a conviction for the conspiracy charged here, the prosecution was required to prove that (1) defendant possessed the specific intent to deliver the quantity of cocaine mixture charged; (2) defendant's coconspirators possessed the specific intent to deliver the quantity of cocaine mixture charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory quantity of cocaine mixture charged to a third person. *Mass*, 464 Mich at 629-630; *Justice (After Remand)*, 454 Mich at 349. Specific intent "may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

The prosecution presented evidence showing that defendant conspired and also participated in the April 30, 2009, cocaine delivery by contributing money to the enterprise, allowing his house to be used to process the cocaine, and acting as a lookout during the transaction. Rocky testified that defendant was intimately involved with the transaction. After seeing how much money his two brothers Michael Cluesman and Daniel made on a previous drug deal, defendant sought to be included in subsequent drug deals. For the next deal, defendant contributed $900 towards the purchase of cocaine and was expecting a return of $2,900. On the day of the drug deal, the cocaine was processed and packaged at defendant's house, at times in plain view of defendant. Additionally, defendant was present in the room when Daniel wrapped the processed cocaine and put it in a plastic bag. At that time, the group discussed that defendant and Michael would act as lookouts during the actual drug transaction at the Meijer store.[2] Defendant, with Michael as a passenger, drove his own vehicle to the Meijer store and parked a few rows away from where Daniel, Rocky, and Detective Bauman were parked. All of this evidence, when viewed in a light most favorable to the prosecution, is sufficient to support defendant's conspiracy conviction. As a result, defendant's claim of there being insufficient evidence to support his conspiracy conviction fails.

II. RIGHT TO PRESENT A DEFENSE

Defendant argues that he was denied the constitutional right to present a defense when the trial court precluded James Daniels (James) from testifying. We disagree.

An issue must be raised, addressed, and decided by the lower court to preserve the issue for appeal. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). While defendant filed a motion to compel production of James, defendant never argued

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[2] Again, defendant denied all of the preceding facts at trial, but credibility determinations are for the trier of fact, not this Court. *Lacalamita*, 286 Mich App at 470.

in the trial court that the court's denial violated his constitutional right to present a defense. Thus, this constitutional issue is not preserved on appeal. Whether a defendant was denied his constitutional right to present a defense is reviewed de novo. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). But unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764. Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *Id*. at 763. Further, reversal is only warranted when the plain, forfeited error resulted in the conviction of an innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the trial. *Id*.

A defendant's constitutionally right to present a defense includes the right to call witnesses. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). But this right is not absolute—defendant "must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Here, defendant sought to compel the production of James, who was housed in the Department of Corrections, so that he could testify. In his offer of proof, defendant stated:

> James Daniels will be offered as a [MRE] 613(b) witness based on the police reports and the testimony given at preliminary examination. The inaccuracies testified to with regard to [defendant's] background and alleged gang membership will be refuted through this witness. He will also be offered to testify to a lack of honesty in character of Rocky Williams [sic] under MCR [sic] 608. He has known Mr. Williams [sic] since Rocky was 15 years old and they were affiliated in brother gangs for years. He can attest to the witness's character for being untruthful.

The prosecutor filed an objection, stating that she had no intention of introducing any gang-related evidence, and James could not speak to Rocky's reputation in the community for truthfulness because James has not seen Rocky since 1995 when both were incarcerated. The trial court denied defendant's motion to compel the production of James. The court stated that because the prosecution was not going to be introducing any evidence of defendant's background, James could not testify on that matter since there was nothing to "refute." Also, the court noted that James's testimony had limited relevance because he and Rocky had not seen each other in at least seven years.[3] The court then determined that, under MRE 403, this limited relevance was substantially outweighed by other concerns, namely that the evidence would be cumulative to the testimony of Daniel and David King.[4] Additionally, the court noted that the

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[3] The record is not clear, but the trial court ostensibly determined this timeframe on the basis of the length of James's incarceration.

[4] King was also listed on defendant's motion to compel, and the trial court granted that portion of the motion.

past gang membership references would necessarily be involved, which would only further confuse the issues for the jury by diverting its attention from the issue of defendant's guilt or innocence and focusing on this collateral issue. As a result, the trial court denied the request to compel the production of James.

Defendant now argues for the first time that James should have been allowed to testify regarding defendant's truthful character on the basis of MRE 404(a)(1), which allows an accused to introduce evidence of a "pertinent" character trait. A pertinent trait, however, is one that *relates to the charged crime*. In other words, a defendant has a "right to introduce evidence of his character to prove that he could not have committed the crime." *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986); see also *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009). Typical examples of pertinent traits include a defendant's character for peacefulness. *Id*. at 93-96. Defendant fails to explain how his truthful character would have made him less likely to have committed the charged crimes. A person's truthfulness has no bearing on his ability to conspire and aid and abet the delivery of cocaine.

Defendant also asserts that James should have been allowed to testify under MRE 613(b)[5] regarding defendant's alleged gang involvement. In his brief on appeal, defendant states he had a right "to contradict testimony as to Defendant's background." But no statements were offered into evidence that addressed defendant's background; thus, there was nothing to contradict.

Defendant next contends that James should have been allowed to testify under MRE 608(a) to attack Rocky's character for truthfulness. But even admissible evidence can be excluded if its probative value is substantially outweighed by other concerns, such as "confusion of the issues" and "the needless presentation of cumulative evidence." MRE 403. The trial court noted that James had not been in contact with Rocky for at least seven years. Hence, the probative value of James's testimony was severely diminished since what is truly significant is Rocky's character for truthfulness at the time he testified. The trial court balanced this limited relevance against the prospect of cumulative evidence, which was expected to consist of Daniel and King both testifying regarding Rocky's lack of truthfulness. Thus, given the limited value of James's testimony, the trial court did not abuse its discretion in determining that any probative value was substantially outweighed by the presentation of cumulative evidence. Moreover, according to defendant's offer of proof, James was going to refer to his association with Rocky when they were 15 years old and were affiliated with gangs. Evidence that a witness was in gang-related activities is not relevant and not admissible because it does not relate to the witness's character for truthfulness. Thus, the record supports the trial court's determination that the probative value of James's proposed testimony would be substantially outweighed by the danger of unfair prejudice, confusion and time wasted presenting cumulative evidence.

Since the constitutional right to present a defense is limited to relevant and admissible evidence, *Chambers*, 410 US at 302; *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120

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[5] MRE 613(b) deals with extrinsic evidence of prior inconsistent statements of witnesses.

(1984), defendant cannot establish any plain error since James's testimony was properly precluded under the rules of evidence. As a result, defendant's claim fails.[6]

Defendant also cursorily argues that the trial court also violated his rights by refusing to allow defendant to call four character witnesses at trial; however, defendant does not cite to the record and fails to specify who these witnesses were and what they would have testified regarding. Since defendant failed to adequately brief this particular aspect of the issue, it is abandoned on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

III. RIGHT TO CROSS-EXAMINE

Defendant argues that he was denied the constitutional right to confront and cross-examine certain police witnesses. We disagree. While defendant raised the issue of whether the testimony regarding forfeiture was admissible, he never raised the constitutional issue of being denied the right of cross-examination. Thus, this claim is unpreserved and is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This right includes, among other things, the ability to cross-examination those witnesses. *People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009). But this right to confrontation does not confer on a defendant an unlimited right to an unlimited right to admit all relevant evidence or cross-examine on any subject. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Furthermore, "[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to other legitimate interests of the trial process. . . ." *Id*. The right of confrontation requires a defendant have a reasonable opportunity to test the truth of a witness's testimony, *Hackett*, 421 Mich at 347, including being able to introduce evidence of bias, prejudice, or lack of credibility of a prosecution witness. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996).

In the present case, when Detective Bauman was testifying, defense counsel asked whether he was aware that three homes were forfeited including defendant's. The prosecutor objected on relevance grounds, and defense counsel stated, "[W]e're showing the over-reaching in this particular case going as far beyond the actual time as they can to continually fund their unit. It's bias." The trial court sustained the objections.

Whether the police instituted forfeiture proceedings has no relevance to whether defendant committed the charged offenses. Defense counsel's tacking the word "bias" at the end of a disjointed argument does not automatically make the area ripe for cross-examination.

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[6] The fact that King later chose not to testify does not affect our analysis. The proper evaluation of a trial's court's decision on a motion to preclude evidence should be based on the information it had had the time the motion was decided. See *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

Defendant's brief on appeal similarly does nothing to expound on how the presence of any forfeiture would shed light on any witness bias. Consequently, defendant has not established that plain error occurred. As a result, his claim fails.

IV. RULE OF COMPLETENESS

Defendant argues that he was denied his constitutional rights when only excerpts of Daniel's recorded phone conversations were played at trial, instead of the complete conversations. We disagree. Defendant never objected to the admission or playing of the recorded phone conversations, and defendant never argued that other portions of the conversations should be admitted. Thus, this constitutional issue is not preserved and is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

The common law "rule of completeness" has been codified in MRE 106. This rule is only pertinent when the adverse party sought, but was denied, permission to have a complete writing or recorded statement introduced. *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). In other words, this rule of completeness does not have any bearing on the admissibility of the recorded statements that were introduced, "except that it might have allowed defendant to supplement the prosecution's proofs." *Id.* Here, defendant never sought to introduce any other portions of Daniel's statement. Thus, the rule of completeness is not implicated, and defendant cannot establish any error, let alone plain error, and his claim fails.

V. DISCOVERY CLAIMS

Defendant claims that he was denied a fair trial because the prosecutor failed to provide Rocky's full criminal record, his record with protective services, and whether he had been given a polygraph examination. We disagree. Defendant preserved the issue related to the disclosure of Rocky's criminal record when his counsel moved for a mistrial on this ground. Defendant also preserved the issue related to the prosecutor's failure to disclosure whether Rocky had been given a polygraph examination. But defendant never asserted in the trial court that the prosecutor failed to disclose the fact that Rocky's children were made state wards; thus, this claim is not preserved. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). We review preserved claims of prosecutorial misconduct de novo to determine whether a defendant received a fair and impartial trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Unpreserved issues are reviewed for plain error affecting substantial rights. *Id*.

"MCR 6.201 governs and defines the scope of criminal discovery in Michigan." *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006). Furthermore, due process only requires the prosecutor to provide defendants with evidence if it is "favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Impeachment evidence falls within this rule and a "prosecutor is a under a duty to disclose any information that would materially affect the credibility of his witnesses." *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998. In order to establish a due process violation, a defendant must prove the following:

> (1) that the state possessed evidence favorable to the defendant; (2) that [the defendant] did not possess the evidence nor could he have obtained it himself

> with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id*. at 281.]

Defendant first argues that the prosecutor failed to disclose Rocky's prior fraud conviction, which was relevant and admissible under MRE 609 for impeachment purposes.[7] Defendant cannot succeed on this claim because he already possessed this information. Defense counsel admitted that she knew about Rocky's fraud conviction a week before the trial started, and, in fact, got Rocky to admit to the conviction at trial. Thus, the failure to disclose Rocky's conviction had absolutely no impact on the trial, and this argument fails.

Defendant next argues that the prosecutor failed to disclose the fact that the state took Rocky's children. This argument fails for two reasons. First, there is absolutely nothing in the lower court record to support such an assertion. "A defendant may not merely assert a claim of error and then leave it to this Court to search for factual or legal support for the claim." *Martin*, 271 Mich App at 315. Second, even if this assertion were true, the prosecution was not required to disclose it because this fact was neither exculpatory nor impeachment evidence. The fact that Rocky may have had his children removed from his care does not speak to his character for truthfulness; instead, it would speak to his ability to parent.

Last, defendant argues that the prosecution failed to disclose whether Rocky took any polygraph tests. First, there is nothing in the record to indicate whether Rocky ever took any polygraph tests. Second, even if such test results existed, they would not have been admissible at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Since any results were inadmissible, it is impossible for defendant to show how the outcome of his trial would have been different if such a disclosure had taken place. Accordingly, this argument fails.

VI. ACCUSATION OF JURY TAMPERING

Defendant argues that "the prosecutor accused Defendant, through his mother and wife, of attempting to influence, threaten and/or intimidate jurors by staging a protest with signs outside the courthouse," which resulted in the jury's being unfairly prejudiced against defendant. We disagree. Defendant failed to preserve this issue by contemporaneously raising this same claim in the trial court and requesting a curative instruction. *Brown*, 279 Mich App at 134. Our review of this unpreserved issue is for plain error affecting substantial rights. *Id*.

After lunch on the second day of trial, in a cleared courtroom outside the presence of the jury, the trial court announced that it had learned that there may have been attempts to influence the jury. Evidently, there was some kind of protest with signs outside the courthouse during the lunch break. The parties agreed that the jurors were to be brought into the courtroom

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[7] The trial court accepted the prosecutor's explanation that she failed to disclose the fraud conviction because it did not appear in all the records she possessed.

individually and questioned to determine whether they were aware of the protest and whether it affected their ability to remain impartial.

The thrust of defendant's argument on appeal is that the jury was somehow tainted as a result of the questioning that took place; however, after the conclusion of the questioning, defense counsel stated that she was satisfied with the jury. Expressing satisfaction with an outcome constitutes a waiver of that issue, which extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Thus, defendant has waived any claim that this incident denied him his right to a fair and impartial trial.

Moreover, even if it were considered as a claim of misconduct, it has two fatal flaws. First, the prosecutor did not question the jurors—only the trial judge did. Thus, there is no factual support for a claim of misconduct. Second, at no time during the questioning did the trial court allege or imply that it was defendant's family protesting. The judge asked whether each juror saw any "people associated with the case" or even more generally, if the juror had seen any "people holding signs." Therefore, defendant's claim that the questioning accused defendant, through his wife and mother, of attempting to influence or threaten the jury is baseless.

VII. ALLEGED WITNESS TAMPERING

Defendant argues that he was denied a fair trial when the officer in charge allegedly threatened two defense witnesses with adverse professional consequences if they testified. The record is completely void of any such incident, and defendant offers nothing to support it. Thus, because a defendant may not "leave it to this Court to discover and rationalize the basis for his claims," *Martin*, 271 Mich App at 315, the issue is abandoned on appeal.

VIII. TRIAL COURT'S USE OF JURY "PILOT PROJECT"

At the time of the trial, the trial judge was participating in a "pilot project" to study the effects of proposed reforms to the jury system in Michigan. Administrative Order No. 2008-2. Defendant claims that four aspects of the pilot project denied him a fair trial. We disagree.

The prosecutor argues that defendant waived the issue entirely when the following exchange took place:

> *THE COURT:* Now I was going to tell you while we have a moment and I think I already told you that in this jury project and some of the things that I'm going to be doing which would include letting the jurors ask questions[, l]etting the jurors take notes[,] letting the jurors have these booklets with the elements[, and h]aving the preliminary instructions that I read[;], they will have copies of them.
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> And then probably the most controversial[:] the ability to discuss the case during the breaks. . . .
>
> *[Defense Counsel]*: Your Honor?
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> *THE COURT*: Yes.

[Defense Counsel]: I would just like to place an objection to the last part that you discussed as far as deliberation occurring during the trial process. My biggest concern with regard to that is the fact that we have two juries and in Mr. Holmes' client's case there's a statement. My client did not give a statement. My concern is if there's overlap between the two juries and they're discussing the case prior to deliberation they may be privy to that statement that Mr. Holmes' client gave. And that gives me great concern.

THE COURT: Well they won't be deliberating together. I mean they won't be talking together. They will each have their own jury room. They will be told that they can discuss the case that they are on during the breaks but they can't decide it. They are to withhold any deliberation. Mainly it's clarification and discussion.

[Defense Counsel]: Could we limit them to discussing it in the jury room?

THE COURT: Oh yes absolutely.

[Defense Counsel]: Okay, thank you.

THE COURT: Not a—oh absolutely.

[Defense Counsel]: Okay. Because that was my concern.

As noted *supra*, Part VI, expressing satisfaction with an outcome constitutes a waiver of that issue, which extinguishes any error. *Carter*, 462 Mich at 215. This is different from mere forfeiture, where there is only a failure to object. *Id.* at 215-216. Here, defense counsel expressed satisfaction with allowing the jurors to discuss the case in their jury room. Hence, the issue is waived with respect to defendant's argument that the jurors should not have been able to discuss the matter before the closing of proofs. But, expressing satisfaction with this single aspect of the pilot project does not extend to the other aspects where there was no objection. Thus, defendant's remaining arguments are merely unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant also argues that providing the jurors with reference books deprived him of a fair trial; however, defendant does not factually support his argument. Instead, defendant generally alleges that the books contained "witness lists, copies of documents, and other information" that had "no bearing on the applicable law or relevant evidence adduced at trial." Defendant points to nothing in the record that details what the books contained. The trial judge explained that the jurors would have a booklet containing the elements of the charged offenses along with a copy of the preliminary instructions. Defendant does not explain how the jurors' having this information served to deprive him of a fair trial, nor can we see how this information would affect defendant's right to a fair trial. Accordingly, defendant has failed to establish any plain error affecting substantial rights, and this argument fails.

Defendant next argues that allowing the jury to take notes deprived him of a fair trial. We observe that allowing jurors to take notes is not unique to the pilot project. MCR 6.414(D)

allows all trial judges the discretion to allow note taking during trials. Defendant's argument that jurors who take notes on a particular matter will be deemed "experts" on that subject matter during deliberations is purely speculative. Moreover, the trial court instructed the jury that their "discussions [should be] carried on in a businesslike way and that everyone [have] a fair chance to be heard," that each juror would have to make up his or her your own mind, and that "[a]ny verdict must represent the individual considered judgment of each juror." Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). Thus, this argument fails.

Defendant's last argument is that the jurors should not have been allowed to submit questions for the witnesses. Defendant's main contention is that it deprived him of a fair trial because it invaded the established role of counsel and was a radical departure from standard trial protocol. But, just because this procedure was different does not mean it was unfair. Defendant again merely speculates when he states that a juror who authors a question *may* exaggerate the importance of the evidence elicited. Assuming arguendo defendant's speculation is accurate, we note the necessity of a unanimous verdict in order to convict clearly acts to ensure that any single juror's viewpoint is not given undue influence or weight. Thus, defendant has not shown any plain error, and this claim fails.

IX. ALLEGED POLYGRAPH AGREEMENT

Defendant argues that his convictions should be reversed because the prosecutor violated an agreement to dismiss the charges if defendant passed a polygraph examination. We disagree. Whether a defendant was denied his due process rights under the Fourteenth Amendment is a question of law we review de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

We note that due process does not require specific performance of a breached plea agreement. *People v Wyngaard*, 462 Mich 659, 667; 614 NW2d 143 (2000). If an authorized promise is breached, an order curing any detrimental reliance is the appropriate remedy. *Id.*

Defendant's framing of the issue is not supported by the record. Defendant claims on appeal that he and the prosecutor agreed that if he passed a polygraph test, the charges would be dismissed. However, the record shows that if any agreement existed, it was if defendant passed a private polygraph examination, then the state would, according to defense counsel, conduct its own polygraph examination of defendant. Thus, there is no record support for defendant's claim on appeal that the prosecutor promised to dismiss the charges if defendant passed a polygraph examination.

Thus, assuming even arguendo that an agreement existed we see no evidence that dismissing the charges was one of the expressed promises. Even defense counsel's own words, "we agreed on a private polygraph examiner with the understanding if my client passed it he would be given the opportunity . . . for a state polygraph," show that the prosecutor did not promise to dismiss any charges. Nothing in the alleged agreement acted to divest the prosecutor of her inherent "broad discretion to bring any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Furthermore, because defendant suffered no detrimental reliance, other than possibly the cost associated with undertaking private polygraph examinations, he is not entitled to any remedy, and this claim fails.

X. REFERENCE TO DEFENDANT'S TIME IN PRISON

Defendant argues that the trial court abused its discretion when it denied his motion for a mistrial based on Rocky's referring to defendant's having spent time in prison. We disagree. A trial court's decision to grant or deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). The trial court abuses its discretion only if it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A motion for a mistrial should be granted only when an irregularity occurs that is prejudicial to the defendant's rights, impairing his ability to get a fair trial. *Id*.; *Bauder*, 269 Mich App at 195.

In this case, defense counsel asked Rocky whom from defendant's family he spent time with after reuniting with them. Apparently confused by the timeframe of the question, Rocky asked if defense counsel meant "when I got out of prison?" To this, defense counsel stated: "Yeah." Rocky then answered that he initially spent time with "Michael and Daniel because [defendant] was in prison when I came home." After taking defense counsel's request for a mistrial under advisement, the trial court denied the motion the following day. The court reasoned that defense counsel had opened the door with his questioning, so it was he who had confused the witness. Further, the court found that the witness was not trying to inject the word "prison," and the attorney's could have, but did not, caution the witness regarding its use. Consequently, the court ruled a mistrial was not warranted, but the jury would be given a cautionary instruction.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279. But in some instances, curative instructions can be inadequate to effectively remove the prejudicial impact of stricken testimony. See e.g., *People v Robinson*, 417 Mich 661, 665-666; 340 NW2d 631 (1983). Here, the reference to defendant's prior time in prison was slight. And, perhaps most importantly, there never was any reference to why defendant had been in prison. Thus, there is no reason why a curative instruction would not have been sufficient to remedy any prejudice to defendant, who is guaranteed a right to a fair trial, not a perfect one. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). Because Rocky's testimony was not so prejudicial that an instruction would have been inadequate, the trial court's decision to deny the motion for mistrial was within the range of reasonable and principled outcomes. Accordingly, defendant's claim fails.

XI. STATEMENT OF CODEFENDANT

Defendant argues that the trial court abused its discretion when it denied his motion for a mistrial based on Daniel's categorizing a statement made by codefendant David C. We disagree.

As noted earlier, a motion for a mistrial should only be granted "for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Bauder*, 269 Mich App at 195. At trial, Daniel testified that defendant was not involved with the cocaine transaction. The prosecutor attempted to impeach Daniel by showing that Daniel's plan all along was to take the blame in order to get everyone else out of trouble. When Daniel countered this by stating that he only wanted "[t]o get the people that didn't have nothing to do with the case out of trouble," the prosecutor played a recorded conversation. On the tape, Daniel told his

mother that he was going to tell the judge that "all this shit" was his so defendant, Michael, David C., and Rocky would be freed. Evidently, Daniel was also recorded saying something to the effect that David C. "cooked himself" by writing a statement. The clear implication is that David C. made incriminating statements regarding *himself*.

Daniel's statement, that David C. had "cooked himself," was relevant impeachment evidence. It showed that, even though Daniel knew that David C. had made incriminating admissions, Daniel was still attempting to get the charges dropped against him (and the others). This fact is contrary to his trial testimony that he only wanted to help those who were not involved. Also, the fact that David C. purportedly made incriminating statements did not prejudice defendant—it pertained only to David C.'s own culpability. As a result, defendant failed to show how his ability to receive a fair trial was affected. Accordingly, the trial court did not abuse its discretion when it came to the same conclusion, and defendant's claim fails.

XII. CUMULATIVE ERROR

Defendant argues that the prejudicial effect of the cumulative errors in this case requires reversal. We disagree. Because we have not identified any prejudicial errors, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Accordingly, defendant's claim of cumulative error fails.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey